Supreme Court, U.S.
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No.:_____

In The

Supreme Court of the United States

October Term, 1996

JOHN FRANCIS WRIGHT,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition For A Writ of Certiorari
To The United States Court of Appeals
For the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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Pro se

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QUESTIONS PRESENTED

1. Under the habeas reform portion of the 1996 Antiterrorism and Effective Death Penalty Act; should a certificate of appealability issue to address district court's refusal to allow amendment when petitioner is attempting to amend with constitutional issues?

2. Whether precedent established in Davis V. United States, 417 U.S. 333 (1974), that issues litigated on direct appeal were cognizable on collateral attack due to intervening change in the law, should have been applied where the court below held that issues had been substantially litigated on direct appeal?

3. In a case in which retained habeas counsel, acting beyond scope of his authority, submitted a § 2255 motion under his own signature and contrary to petitioner's specific instructions; and counsel thereafter refused to amend the petition at petitioner's request; did the district court have jurisdiction to hear a § 2255 motion that had neither been signed, approved, nor adopted by petitioner?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

John Francis Wright, proceeding pro se, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, page 1a), No.: 96-1586, was not reported. The order denying petition for rehearing (App., *infra*, 3a & 4a) was not reported

JURISDICTION

The judgment of the court of appeals was entered on October 1, 1996 (App., *infra*, 1a). A petition for rehearing was denied on December 2, 1996 (App., *infra*, 3a & 4a). The jurisdiction of this Court is invoked under Title 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provisions of 18 U.S.C. §§ 2, 371, 1956, and 1957, 21 U.S.C. §§ 841 and 846, 28 U.S.C. §§ 1746, 2253, and 2255, Rule 2, § 2255 Rules, Rule 11, F.R.C.P., Rule 15, F.R.C.P., and Rule 22, F.R.A.P. are reproduced at App., *infra*, 16a-53a.

STATEMENT OF THE CASE

Procedural History

On 22 March 1991, John Francis Wright was charged, through a second superseding indictment, as follows: Count One - Conspiracy to possess with intent to distribute and to distribute marijuana, 21 U.S.C. §§ 846 and 841; Count Two - Possession with intent to distribute marijuana and aiding and abetting, 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2; Count Four - Conspiracy to launder monetary instruments, 18 U.S.C. §§ 1956(a)(1)(B) and 371; Count Five Laundering of monetary instruments and aiding and abetting, 18 U.S.C. §§ 1956(a)(1)(B) and 2; Count Six - Engaging in monetary transactions in criminally derived property and aiding and abetting, 18 U.S.C. §§ 1957 and 2. The foregoing charges were brought in the United States District Court, Eastern District of Michigan, under criminal number 2:90-CR-80863 D4.

On 7 August 1991, a jury was impaneled and trial begun. On 17 August 1991, John Wright was found guilty of all counts.

On 14 November 1991, Mr. Wright was sentenced to 188 months on Counts One, Two, Four, and Five, and to 120 months on Count Six, all to be served concurrently.

John Wright filed a timely notice of appeal, briefs were submitted, and the United States Court of Appeals for the Sixth Circuit affirmed the conviction and sentence on 14 November 1993.

On 8 August 1995, Attorney, James C. Howarth filed a motion, pursuant to Title 28 U.S.C. § 2255, to vacate sentence. On 8 September 1995, the government responded to the § 2255 motion.

On 18 September 1995, Attorney Howarth replied to the government's response. On 16 January 1996, the district court denied the § 2255 motion.

On 27 January 1996, John Wright submitted a pro se motion for reconsideration, requesting the district court to vacate, amend or modify the order dismissing the § 2255. On 17 April 1995, the district court denied the motion for reconsideration.

On 24 April 1996, Mr. Wright filed a timely notice of appeal from the order denying the § 2255 and from the order denying reconsideration. A briefing schedule was established and Petitioner submitted a timely brief. On 10 June 1996, appellate case number 95-1586 was held in abeyance pending the issuance of a certificate of APPEALABILITY. On 01 October 1996 the certificate of APPEALABILITY was denied. A timely petition for rehearing was filed and that was denied on 02 December 1996.

Relevant Facts

Prior to indictment in the instant case, property owned by Petitioner Wright was forfeited by the government. In Civil Action No.: 89 CV 40098 FL the government brought a forfeiture action against property located at 1945 County Farm Road, Howell, Michigan. During the forfeiture trial, Petitioner Wright was called as a witness by the government. Through compelled testimony, the government elicited, inter alia, information pertaining to monetary transactions, the purchase of the County Farm Road property, the presence at his residence and at 1945 County Farm Road of inculpating evidence, the source of funds utilized to purchase 1945 County Farm Road, Petitioner Wright's knowledge of illegal activities taking place at 1945 County Farm, Petitioner Wright's acquaintance with one Michael Shandilis, and information pertaining to monetary instruments, ledgers, tally sheets, and transfers of personal property (R 324, p. 700-747).

At the criminal trial, Special Agent Charles Moffitt was called to the stand to introduce and read into the record testimony compelled from Petitioner Wright during the forfeiture proceeding (R 324, p. 700-747).

On 17 July 1991, John Wright was convicted on all counts. On 14 November 1991, Mr. Wright was sentenced to 188 months on Counts One, Two, Four, and Five, and to 120 months on Count Six. The district court ordered all counts to be served concurrently.

On appeal, Mr. Wright argued that (1) the compelled testimony from the forfeiture trial was improperly admitted into the criminal trial; (2) the district court utilized an improper drug amount in computing his base offense level (BOL); and (3) he should not have been enhanced as a leader/organizer.

As to relevant conduct, in its appellate brief, the government argued that Mr. Wright was responsible for those drug amounts that had been dealt by his codefendants, citing case law that has been subsequently clarified. Furthermore, subsequent to the appeal, new case law has emerged applying *Simmons v. United States*, 390 U.S. 377 (1968) to the context of forfeiture trial testimony being utilized at a criminal trial.

In 1995, Petitioner Wright retained Attorney, James C. Howarth to pursue post-conviction relief. Mr. Wright instructed Attorney Howarth to research the case, address all meritorious issues, and to present the motion to Mr. Wright prior to filing it with the court (R 395, Motion at page 5, and Declaration of John Wright, at page 1). On 08 August 1995, contrary to Mr. Wright's instructions, Attorney Howarth filed a § 2255 motion under his own signature.

In the Petition to Vacate Sentence, Attorney Howarth made a statement pertaining to the fact that Mr. Wright's compelled testimony, from the forfeiture proceeding, was used against him in the criminal proceeding (R 366, Petition to Vacate, at pages 2-3). The foregoing notwithstanding, the only argument addressed in the accompanying Memorandum in Support of Petition to Vacate was a double jeopardy claim based upon the prior forfeiture (R 366).

On 14 August 1995, the Honorable George E Woods established a strict and relatively short briefing schedule to be followed in the § 2255 proceedings (R 367). On 08 September 1994, the government responded to the § 2255 (R 368). On 18 September 1995, Attorney Howarth replied to the government's response (R 438). On that same date Attorney Howarth mailed to Mr. Wright the first indication that the proceedings had been initiated. He provided: (1) the initial § 2255; (2) the government's response; and (3) Attorney Howarth's reply to the government's response.

Subsequent to receipt of documents filed in the § 2255 action, Mr. Wright requested assistance from other sources to assure that the § 2255 was properly filed (R 395, Declaration of John Wright, and Motion to Vacate, page 5). On 11 December 1995, Mr. Wright sent a letter to Attorney Howarth, requesting that certain amendments be made to the § 2255 (R 395, Motion, page 5 and Exhibit B). Mr. Wright then spoke with Attorney Howarth on the phone, again making the request that amendments be made to the § 2255 (R 395, Motion, page 6). Attorney Howarth explained to Mr. Wright that the issues not raised below could in fact be raised on appeal in the event that an appeal became necessary (Id.).

Petitioner Wright then undertook the task of preparing a pro se amendment to the petition (R 395, Motion, page 5, and Exhibit "A").

On 16 January 1996, the district court denied the § 2255 motion, holding that the double jeopardy claim had been procedurally defaulted (R 385, page 10), and that Attorney Howarth had failed to show cause for the procedural default (Id. at page 11).

On 19 January 1996, Mr. Wright received the order denying the § 2255. On that same date, Mr. Wright was prepared to submit the *pro se* amendment (R 395, page 5).

On 27 January 1996, Mr. Wright submitted a Motion to Vacate, Amend or Modify Order Dated January 16, 1996, to Allow Amendments to the § 2255 Motion, or to Dismiss Without

Prejudice the § 2255 Motion for Lack of Jurisdiction, and a Declaration of John Wright (R 395).

In the Motion to Amend, and the accompanying declaration, Mr. Wright asserted that: (1) he had retained Attorney Howarth to address all meritorious issues; (2) Mr. Wright had instructed Attorney Howarth to present the § 2255 to Mr. Wright prior to filing: (3) contrary to Mr. Wright's instructions, Attorney Howarth submitted the § 2255 under his own signature; (4) Attorney Howarth failed to acquire or review records pertaining to the criminal case; (5) Attorney Howarth had failed to address all meritorious issues; (6) Attorney Howarth had refused to amend the § 2255 upon Mr. Wright's instructions; (7) Appellant Wright should be allowed to amend the § 2255 with meritorious issues; (8) there had been clarifying Circuit case law with retroactive application, making all relevant conduct arguments cognizable in post conviction proceedings; (9) the improper submission of evidence issue had been recently recognized, through case law, and was therefore cognizable; and (10) in the alternative to amendment, the § 2255 should be dismissed without prejudice for lack of jurisdiction (R 395).

On 17 April 1996, the district court denied Mr. Wright's Motion to Vacate, Amend, or Modify (R 435). The district court held that Rule 2 of the Rules Governing Section 2255 Proceedings in the United States District Court (§ 2255 Rules) does not require petitioners to sign the § 2255 motion (R 435, page 3); that Rule 15, Federal Rules of Civil Procedure (F.R.C.P.) does not apply in the instant case (*Id.*, at 4); that Attorney Howarth "employed his professional judgment and adopted the sound strategy of concentrating on the one claim which had the best chance of succeeding" (*Id.*); that the issues that Mr. Wright wished to address had previously been litigated (*Id.*); and that Mr. Wright would not be allowed to amend the § 2255 motion (*Id.*).

On 24 April 1996, Mr. Wright filed a timely notice of appeal from both the order denying the § 2255 and the order denying the

motion to amend or vacate (R 436). Mr. Wright submitted a timely appellate brief. On 05 June 1996, the appellate case was held in abeyance pending issuance of a certificate of appealability. Mr. Wright relied upon his appellate brief to establish propriety of issuance of the certificate of APPEALABILITY. Issuance of the certificate of APPEALABILITY was denied on 01 October 1996.

On 11 October 1996, Petitioner Wright filed a Petition for Rehearing on Denial of Certificate of APPEALABILITY, And an Amendment to same (App., *infra*, 5a - 8a), arguing that (1) the district court's refusal to allow leave to amend with constitutional issues resulted in a constitutional violation that should result in the issuance of a certificate of appealability (*Id.*); (2) that the issue pertaining to submission, at the criminal trial, of Mr. Wright's compelled testimony, from the forfeiture trial, resulted in a due process violation and was now cognizable on collateral attack (*Id.* at 6a); (3) that the foregoing issue was not available at the time that the § 2255 was submitted and that intervening case law caused it to be cognizable (*Id.*); (4) that his sentencing issue was based upon the fact that he had been sentenced pursuant to inaccurate information resulting in a due process violation (App., infra, 6a) that had been addressed on direct appeal, but was now cognizable due to intervening case law (*Id.*, at 6a and 7a); and that (5) the § 2255 motion filed, contrary to his instructions, by Attorney Howarth should have been dismissed once this situation was brought to the district court's attention (*Id.*) and that failure to allow amendment or to dismiss the petition resulted in a due process violation that should cause issuance of a certificate of APPEALABILITY (*Id.*).

REASONS FOR GRANTING THE WRIT

I. UNDER THE HABEAS REFORM PORTION OF THE 1996 ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT, A CERTIFICATE OF APPEALABILITY SHOULD ISSUE TO ADDRESS THE DISTRICT COURT'S REFUSAL TO ALLOW AMENDMENT WHEN PETITIONER IS ATTEMPTING TO AMEND WITH CONSTITUTIONAL ISSUES.

A writ of certiorari should issue in this case so that this Court can establish the criteria that should apply in issuing a certificate of APPEALABILITY under the new 1996 ANTITERRORISM and Effective Death Penalty Act (AEDPA).

In the instant case, HABEAS counsel, James C. Howarth, acting beyond the scope of his authority, filed a § 2255 motion under his own signature. Petitioner Wright was not aware of the filing until after the government had responded to the § 2255. Mr. Wright then instructed Attorney Howarth to amend the § 2255. Attorney Howarth did not react to these instructions. After requesting amendment a second time to no avail, Mr. Wright began to construct a *pro se* amendment. Mr. Wright was prepared to submit the amendment on the same day that he received the order denying the § 2255.

Mr. Wright then filed a Motion to Vacate, Amend, or Modify the order denying the § 2255, explaining to the district court precisely what had transpired between him and Attorney Howarth. The district court did not question Mr. Wright's allegations, it simply held that it was not necessary for Mr. Wright to sign the § 2255, and that Mr. Wright would not be granted leave to amend.

It is Mr. Wright's position that the Circuit Court should have issued a certificate of APPEALABILITY to determine the propriety of the district court's refusal to allow amendment with constitutional issues.

The relevant portion of the AEDPA states:

(c)(1) Unless a circuit justice of judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from -

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

28 U.S.C.§ 2253(c)(1), and (c)(2).

The Circuit Court looked only to whether the district court abuse its discretion by refusing leave to amend. The Circuit Court did not look to whether "a substantial showing of the denial of a constitutional right" had been made by the district courts refusal to allow leave to amend with constitutional issues that were cognizable on collateral attack.

Given the facts of this case: (1) that Attorney Howarth exceeded his authority in initiating the § 2255; (2) that Mr. Wright, subsequent to receipt of the § 2255, instructed Attorney Howarth to amend same; (3) that Attorney Howarth refused to amend the § 2255 at Mr. Wright's request; (4) that Mr. Wright attempted to amend the § 2255 *pro se*; (5) and that Mr. Wright did not sign, approve, nor adopt; the Circuit Court should have looked beyond the abuse of discretion to whether refusal to grant leave to amend resulted in a "denial of a constitutional right."

Furthermore, the Circuit Court violated Supreme Court *precedent established in Davis v. United States,* 417 U.S. 333 (1974)(holding that issues rejected on direct appeal were cognizable on collateral attack due to intervening change in circuit law) when it held that Mr. Wright could not raise his new claims because they "had already been substantially rejected on direct appeal." (App., *infra*, 4a), see also Issue II, *infra*.

Therefore, the district court and the circuit court inappropriately disallowed Mr. Wright to raise his constitutional issues. The district court's rejection of Mr. Wright's issues resulted in a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This issue, in and of itself, constitutes a proper basis for the issuance of a certificate of appealability.

This Court should either grant the writ or remand this case to the Sixth Circuit for issuance of a certificate of appealability.

II. PRECEDENT ESTABLISHED IN DAVIS V. UNITED STATES, 417 U.S. 333 (1974), THAT ISSUES LITIGATED ON DIRECT APPEAL WERE COGNIZABLE ON COLLATERAL ATTACK DUE TO INTERVENING CHANGE IN THE LAW, SHOULD HAVE BEEN APPLIED WHERE THE COURT BELOW HELD THAT ISSUES HAD BEEN SUBSTANTIALLY LITIGATED ON DIRECT APPEAL.

A writ of certiorari should issue so that *Davis v. United States,* 417 U.S. 333 (1974) can be applied to the Circuit Court's holding that "the claims that Wright proposed to raise by amendment had already been substantially rejected on direct appeal." (App., *infra,* 4a). The Circuit Court failed to consider precedent established in Davis, that is on all fours with the circumstances of this case. The issues that Mr. Wright tried to raise had been litigated on direct appeal and rejected. But, just like Davis, intervening changes in substantive law made these claims cognizable on collateral attack. In *Davis v. United States,* 417 U.S. 333, 341, 41 L.Ed.2d 109, 116 (1974) this Court considered "the extent to which relief under 28 USC § 2255 [ ] is available by reason of an intervening change in law." More specifically, this Court examined "the Court of Appeals judgment that a change in the law of that Circuit after the petitioner's conviction may not be successfully asserted by him in a § 2255 proceeding." *Id.*

> In Sanders, the Court held, inter alia, that even though the legal issue raised in a § 2255 motion "was determined against [the applicant] on the merits on a prior application," "the applicant may [nevertheless] be entitled to a new hearing upon showing an intervening change in the law . . . Sanders v. United States, 373 US 1, 17, 10 L Ed 2d 148, 83 S Ct 1068. The same rule applies when the prior determination was made on direct appeal from the applicant's conviction, instead of in an earlier § 2255 proceeding, "if new law has been made . . . since the trial and appeal." Kaufman v United States, 394 US 217, 230, 22 L Ed 2d 227, 89 S Ct 1068 (1969). Thus, the Court of Appeals erred in holding that "the law of the case," as determined in the earlier appeal from petitioner's conviction, precluded him from securing relief under § 2255 on the basis of an intervening change in law.

Davis, supra, 417 U.S. at 342, 41 L.Ed.2d at 116.

At the time of sentencing in the instant case, 14 November 1991, it was common practice for the district court to use the entire amount of drugs attributable to a given conspiracy when sentencing each defendant. Subsequent to sentencing, on 01 November 1992, the sentencing guidelines were amended with Amendment # 439. Amendment # 439 clarifies the extent to which activities of codefendants may be attributed to an individual. The effect of this amendment is that an individual may not be sentenced to specific activities unless that individual jointly agreed to undertake said activities. The implementation of this amendment, including the fact that it applies retroactively, is fully explained in *United States v. Okayfor*, 996 F.2d 116, 120-23 (6th Cir.1993), and *United States v. Jenkins*, 4 F.3d 1338, 1345-47 (6th Cir.1993). Furthermore, in *Oliver v. United States*, 90 F.3d 177,179 (6th Cir.1996), the court held that case law stemming from clarifying, sentencing guideline amendments applies retroactively on collateral attack.

On direct appeal the government argued the case law that was overturned by the foregoing cases, i.e., *Okayfor, supra*, and *Jenkins, supra* (App., *infra*, 12a - 16a). The government cited *United States v. Blankenship*, 954 F.2d 1224 (6th Cir.1992) to show that at the time of sentencing in this case "a defendant can be sentenced to the conduct of his codefendant where the defendant knew or should have known the amount of drugs involved." (App., infra, 12a). The government also cited *United States v. Sailes*, 872 F.2d 735 (6th Cir.1989) to show that at that time "responsibility for others' conduct is required under the guidelines even where the defendant was not specifically aware of the total amount of drugs involved." (App., infra, 12a).

The Sixth Circuit, in *Okayfor, supra*, and *Jenkins*, supra, pursuant to Amendment # 439, overturned the foregoing, all encompassing relevant conduct case law.

> A further amendment to this section meant to clarify and fully illustrate the operation of the guideline, U.S.S.G.App. C, Amend. 439, states that "the scope of the criminal activity jointly undertaken by the defendant . . . is not necessarily the same as the scope of the entire conspiracy. . . ." U.S.S.G. §1B1.3, comment. (n.2)(1992). "In order to determine the defendants accountability for the conduct of others under subsection (a)(1)(B), the court must first determine the scope of the criminal activity the particular defendant agreed to jointly undertake (*i.e.*, the scope of the specific conduct and objectives embraced by the defendant's agreement.)" Id. While this amendment was not effective when Okayfor and Okosi were sentenced, it is instructive as to the proper interpretation to be given to the 1991 version of U.S.S.G. § 1B1.3(a)(1). See *United States v. French*, 974 F.2d 687, 699 (6th Cir.1992)(using subsequent amendments to the guidelines to assist interpretation),[ ].

Okayfor, supra, 996 F.2d at 121.

> The court's finding of foreseeability is not clearly erroneous. However, foreseeability is only one of the limitations on the ability of the court to charge one participant in conspiracy with the conduct of the other participants.

Jenkins, supra, 4 F.3d at 1346.

> In this case, the district court did not address, implicitly or explicitly, the scope of the criminal activity [defendant] agreed to jointly undertake. Without such a finding, we lack an adequate basis on which to differentiate between [defendant] and other members of the [ ] conspiracy.

Id., at 1347.

Petitioner Wright attempted to present cognizable relevant conduct claims that had been rejected on direct appeal. The Circuit Court failed to consider *Davis, supra,* and the fact that intervening case law would affect the analysis undertaken to resolve the issues. Therefore, this Court should grant a writ of certiorari so that this issue may be fully briefed and finally resolved, or this Court should remand to the Circuit Court in light of *Davis, supra.*

Petitioner Wright also attempted to present another claim that had been rejected on direct appeal - that his compelled testimony from the forfeiture proceeding was improperly submitted in the criminal trial. Wright's appellate counsel argued the relevance of the forfeiture testimony and that it was hearsay.

Subsequent to appeal, the impropriety of admitting compelled testimony from a forfeiture proceeding into a criminal trial was recognized in *United States v. Cretacci,* 62 F.3d 307, 311 (9th Cir.1995), (citing *Simmons v. United States,* 390 U.S. 377, 394, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968)).

The *Simmons* court found that use of testimony, under these circumstances, is reversible error. *Cretacci* was decided on 4 August 1995, only four days prior to submission of the § 2255 motion in this case. *Cretacci* was the first case to recognize the *Simmons* argument in the forfeiture trial/criminal trial context. The Eastern District of Michigan did not recognize the application of *Simmons* in this context until 17 November 1995, when *United States v. Barber*, 906 F.Supp. 424, 427 (E.D. Mich. 1995) was decided. Therefore, this issue was not available when the § 2255 motion was submitted and the district court should have allowed amendment to address this issue. Refusal to allow said amendment resulted in a due process violation. A certificate of appealability should have been issued to resolve this constitutional issue.

Davis, supra, addressed intervening change in Circuit law. The analysis should be no different in this situation, where an intervening change in district law makes an argument that was rejected on direct appeal cognizable in a collateral attack. Mr. Wright does not have to show cause for failure to bring that particular argument. In the event that the district court held that the *Simmons* argument was available for direct appeal, Mr. Wright would argue that defense counsel was ineffective for failure to bring that argument.

This Court should grant the writ so that this issue may be fully briefed, or remand in light of *Davis, supra*, for issuance of a certificate of appealability.

III. IN A CASE IN WHICH RETAINED HABEAS COUNSEL, ACTING BEYOND SCOPE OF HIS AUTHORITY, SUBMITTED A § 2255 MOTION UNDER HIS OWN SIGNATURE AND CONTRARY TO PETITIONER'S SPECIFIC INSTRUCTIONS; AND COUNSEL THEREAFTER REFUSED TO AMEND THE PETITION AT PETITIONER'S REQUEST; THE DISTRICT COURT DID NOT HAVE JURISDICTION TO HEAR A § 2255 MOTION THAT HAD NEITHER BEEN SIGNED, APPROVED, NOR ADOPTED BY PETITIONER.

Contrary to Petitioner Wright's instructions, Attorney Howarth submitted a § 2255 motion under his (Attorney Howarth's) own signature. Petitioner Wright attempted to have the § 2255 motion dismissed for lack of jurisdiction due to the fact that the § 2255 had not been signed by Petitioner as required by Rule 2 of the Rules Governing Proceedings in the United States District Courts Under Section 2255 of Title 28, United States Code (§ 2255 Rules) (R 395).

The district court denied dismissal, holding that Rule 2, § 2255 Rules does not require petitioners to sign the motion. The Circuit Court held that "Wright was not required to sign a motion that was submitted by his attorney" (App., *infra*, 1a).

The § 2255 Rules were adopted through an order of the Supreme Court, on 26 April 1976, pursuant to Title 28 U.S.C. § 2072. On 28 September 1976, Congress approved the § 2255 Rules with certain amendments and declared that the § 2255 Rules would become effective on 01 February 1977.

At the time of adoption, the pertinent portion of Rule 2, 2255 Rules, stated:

> (b) Form of motion. The motion shall be in substantially the form annexed to these rules, except that any district court may by local rule require that motions filed with it shall be in a form prescribed by the local rule. Blank motions in the prescribed form shall be made available without charge by the clerk of the district court to applicants upon their request. It shall specify all the grounds for relief which are available to the movant and of which he has or by the exercise of reasonable diligence should have knowledge and shall set forth in summary form the facts supporting each of the grounds thus specified. It shall also state the relief requested. The motion shall be typewritten or legibly handwritten and *shall be signed and sworn to by the petitioner.* (emphasis added.)

Rule 2(b), § 2255 Rules (1977).

On 28 April 1982, Rule 2 was amended to conform with Title 28 U.S.C. § 1746 - allowing unsworn statements to be given under the penalty of perjury - and had an effective date of 01 August 1982. The Advisory Committee had the following comments:

> The amendment takes into account 28 U.S.C. § 1746, enacted after adoption of the § 2255 rules . . . . The statute is "intended to encompass prisoner litigation," and the statutory alternative is especially appropriate in such cases because a notary might not be readily available. *Carter v. Clark*, 616 F.2d 228 (5th Cir.1980). The § 2255 forms have been revised accordingly.

Advisory Committee Notes, 1982 Amendment. In *Carter v. Clark*, 616 F.2d 228, (5th Cir.1980) the court held that a local district court rule "requiring notarization of prisoner petitions in contravention of 28 U.S.C. § 1746 must be abrogated. "Id. at 231. The final line of Rule 2(b), § 2255 Rules, subsequent to amendment, reads as follows:

> The motion shall be typewritten or legibly handwritten and shall be signed under penalty of perjury by the petitioner. (emphasis added).

In its original form, Rule 2, § 2255 Rules, required that the motion "be signed and sworn to by the petitioner." The Supreme Court amended Rule 2, § 2255 Rules, so that prisoners did not need to rely on prison officials to provide a notary public. In its amended form Rule 2 requires that the motion "shall be signed under penalty of perjury by the petitioner." The Advisory Committee directly tied this amendment to Title 28 U.S.C. § 1746. Section 1746 requires that the document be "in writing of such person which is *subscribed by him*, as true under penalty of perjury . . . ." (emphasis added).

Webster's Third New International Dictionary, 1993 edition defines *subscribed* as follows: 1: to write (as ones name) underneath : sign (ones name) to a document 2a: to sign with one's own hand : give consent to or bind oneself to the terms of (something written) by appending one's name. *Black's Law Dictionary Sixth Edition*, 1990, defines *subscribe* as follows: Literally to write underneath, as one's name. To sign at the end of a document.

Rule 2, § 2255 Rules, requires that "[t]he motion shall be in substantially the form annexed to these rules . . . ." The form annexed to the § 2255 Rules provides a space for "Signature of Attorney (if any)" *and* a space in which the Movant is required to sign, and date, the motion under penalty of perjury.

In *Business Guides v. Chromatic Comm.*, 498 U.S. 533, 112 L.Ed.2d 1140, 111 S.Ct. 922 (1991) the Court analyzed situations in which represented parties are required by rule or statute to verify pleadings or sign affidavits. The Court found that Rule 11, Federal Rules of Civil Procedure (F.R.C.P.), controls these situations.

> The first three sentences of the Rule explain in what instances a signature is mandatory.... Sentence [3] acknowledges that in some situations represented parties are required by rule or statute to verify pleadings or sign affidavits.

Id., 498 U.S. at 541-42, 112 L.Ed.2d at 1153. The Court went on to hold that when a specific rule requires verification, enforcement of that rule becomes mandatory. Id., 498 U.S. at 543-44, 112 L.Ed.2d at 1154.

> When a situation is covered by one of the Federal Rules, . . .: the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions.

Hanna v. Plumer, 380 U.S. 460, 471, 14 L.Ed.2d 8, 17, 85 S.Ct. 1136 (1965). See also *Carver v. Bunch*, 946 F.2d 451, 453 (6th Cir. 1991)(holding that local court rules cannot conflict with the Federal Rules of Civil Procedure, Acts of Congress, and rules of practice and procedure prescribed by the Supreme Court).

In the instant case, Attorney Howarth submitted the § 2255 motion under his own signature (R 366), with no regard for the dictates of Rule 2, § 2255 Rules. Attorney Howarth did not acquire the signature of Mr. Wright, did not submit the motion under penalty of perjury, and did not submit the motion in substantially the form annexed to the § 2255 Rules.

Mr. Wright was not aware that the motion had been filed until sometime after 18 September 1995. Mr. Wright then requested that the motion be amended with additional arguments that had been rejected on direct appeal but were now cognizable due to intervening changes in the law (R 395, Motion, page 5, and Exhibit B attached thereto) and (Issue II, *supra*). Mr. Wright then spoke with Attorney Howarth on the phone, again making the request that amendments be made to the § 2255 (R 395, Motion, page 6). On the phone, Attorney Howarth explained to Mr. Wright that the issues not raised on the § 2255 could in fact be raised on appeal of the § 2255 in the event that an appeal became necessary (*Id.*).

Petitioner Wright then undertook the task of preparing a *pro se* amendment to the § 2255 (R 395, Motion, page 5, and Exhibit A attached thereto). On 19 January 1996, Mr. Wright received the order denying the § 2255. On that same date, Mr. Wright was prepared to submit the pro se amendment (R 395, page 5). On 27 January 1996, Petitioner Wright submitted a Motion to Vacate, Amend or Modify Order Dated January 16, 1996, to allow Amendments to the § 2255 Motion, or to Dismiss Without Prejudice the § 2255 Motion for Lack of Jurisdiction, and a Declaration of John Wright (R 395).

In the aforementioned motion, filed on 27 January 1996, Mr. Wright asserted that: (1) he had retained Attorney Howarth to address all meritorious issues; (2) Mr. Wright had instructed Attorney Howarth to present the § 2255 to Mr. Wright prior to filing; (3) contrary to Mr. Wright's instructions, Attorney Howarth failed to acquire or review records pertaining to the criminal case; (5) Attorney Howarth had failed to address all meritorious issues; (6) Attorney Howarth had refused to amend the § 2255 upon Mr. Wright's instructions; (7) Mr. Wright should be allowed to amend the § 2255 with meritorious issues; (8) there had been clarifying Circuit case law with retroactive application, making all relevant conduct arguments cognizable in post-conviction proceedings; (9) the improper submission of evidence issue had been recently recognized in the Eastern District of Michigan and was therefore cognizable; and (10) in the alternative to amendment, the § 2255 should be dismissed without prejudice for lack of jurisdiction (R 395).

On 17 April 1996, the district court denied Mr. Wright's motion (R 435). The district court held that Rule 2, § 2255 Rules, does not require petitioners to sign the § 2255 motion (R 435, page 3). The Circuit Court held that "Wright was not required to sign a motion that was submitted by his attorney" (App., *infra*, 1a).

The decisions of the courts below are contrary to Rule 2 of the § 2255 Rules, Rule 11, F.R.C.P., Title 28 U.S.C. § 1746, and precedent established by this Court, i.e., *Business Guides v. Chromatic Comm.*, *supra*, and *Hanna v. Plumer, supra*. Pursuant to the foregoing analysis, there can be no question that the courts below misapprehended the law.

Rule 2, § 2255 Rules, demands that petitioners sign the motion - the word shall is not discretionary. The district court may have discretion in determining whether the motion complies with local rules and whether the motion is typewritten or legibly handwritten, but the motion is either signed by the petitioner or it is not. The Advisory Committee directly tied Rule 2 to Title 28 U.S.C. § 1746

which requires that the document be "in writing of such person which is *subscribed* by him, as true under penalty of perjury and dated . . . ." The Sixth Circuit has held that even technical deficiencies of submissions pursuant to § 1746, would exclude the document from consideration. See *Bonds v. Cox*, 20 F.3d 697, 702 (6th Cir.1994)(holding that undated documents were deficient. "Given the explicit language of the statute, they must therefore be excluded from consideration").

In *Business Guides v. Chromatic Comm., supra*, the Court held that "where a required signature is missing and the omission is not corrected promptly, the document will be stricken." *Id.*, 498 U.S. at 543, 112 L.Ed.2d at 1154.

In its original form, Rule 2, § 2255 Rules, required the motion to be "signed and sworn to by the petitioner." Upon amendment, the "sworn to" language was replaced with a requirement that the motion "shall be signed under penalty of perjury by the petitioner." The purpose of this amendment was to ease prisoner's burden in filing § 2255 motions in cases in which a notary might not be readily available. This amendment was tied directly to Title 28 U.S.C. § 1746 - providing for utilization of unsworn declarations to have same force and effect of sworn declarations. Nothing in the foregoing amendment removed the signature requirement, nor is it possible to forego signature of documents submitted pursuant to 28 U.S.C. § 1746.

Furthermore, the current version of Rule 2 requires that "[t]he motion shall be in substantially the form *annexed to these rules* . . . ." The form annexed to these rules contains a space for an attorney's signature *in addition* to the space for the movant to sign under penalty of perjury.
(emphasis added.)

Therefore, the Circuit Court was incorrect in its holding that "Wright was not required to sign a motion that was submitted by his attorney" (App., *infra*, 1a). This type of logic would allow *any*

attorney to submit a § 2255 on behalf of *any prisoner*, or, as in this case, for retained counsel to initiate an action that is inconsistent with the wishes of his client. Attorney Howarth completely ignored the professional responsibilities and ethics of an attorney/client relationship, and failed to follow required procedures in initiating the action in question. For lack of Petitioner Wright's signature, the district court did not have jurisdiction to hear the § 2255 and it should be stricken.

Given the fact that the Sixth Circuit has held that undated documents "must therefore be excluded from consideration," *Bonds v. Cox, supra*, at 702, it is incomprehensible for that court to rule that a § 2255 motion does not have to be signed by the petitioner. It cannot be held that the lack of a date is a more egregious than the lack of a signature. The Circuit Court's decision must be overturned.

This Court should grant the writ so that this issue may be fully briefed, or remand this case with instructions to strike the § 2255, filed by Attorney Howarth, from the record.

WHEREFORE, Petitioner, John Francis Wright prays that this Honorable Court will grant the writ so that the foregoing issues may be fully briefed, or, in the alternative, to remand this case to the court below with specific instructions to grant the appropriate relief.

Respectfully submitted

JOHN FRANCIS WRIGHT
DELORES DONAHUE POA.

JAN. 15, 1997

Date

John Francis Wright pro se
21269 Woodhill Drive
Northville, MI 48167

Ph.# (810) 477-0445

No.:_____

In The

Supreme Court of the United States

October Term, 1996

JOHN FRANCIS WRIGHT,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Appendix To
Petition For A Writ of Certiorari
To The United States Court of Appeals
For the Sixth Circuit

John Francis Wright
Pro se

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN FRANCIS WRIGHT,
Petitioner-Appellant,

vs. ORDER

UNITED STATES OF AMERICA,
Respondent-Appellee

John Wright appeals pro se from a district court judgment that denied a motion to vacate his sentence under 28 U.S.C. § 2255. The receipt of the certified record has been construed as his application for a certificate of appealability. See 28 U.S.C.A. § 2253(c)(1)(B) (West 1996).

In 1991, a federal jury convicted Wright of conspiring to possess marijuana for intended distribution, possessing marijuana for intended distribution, conspiring to launder money, laundering money and engaging in monetary transactions with criminally derived property. See 18 U.S.C. §§ 2, 371, 1956 and 1957; 21 U.S.C. §§ 841(a)(1) and 846. He was sentenced to a total of 188 months of imprisonment and four years of supervised release.

Wright has not made a substantial showing of the denial of a federal right, as required by 28 U.S.C.A. § 2253(c)(2) (West 1996). Cf. Barefoot v. Estelle, 463 U.S. 880, 893 (1983). In his § 2255 motion, Wright alleged that he was sentenced in violation of the Double Jeopardy Clause because his property had been forfeited in a separate civil proceeding under 21 U.S.C. § 881(a)(7). This argument lacks merit because such "in rem civil forfeitures are neither 'punishment' nor criminal for purposes of the Double Jeopardy Clause." United States v. Ursery, 116 S. Ct. 2135, 2149 (1996).

In a motion for reconsideration, Wright argued that his attorney had not raised other issues in the § 2255 motion and had not submitted the motion to him for review. These arguments are unavailing because the district court acted within its discretion by refusing to allow amendment of the § 2255 motion after it was denied. The court also properly determined that Wright was not required to sign a motion that was submitted by his attorney.

Accordingly, the application for a certificate of appealability is DENIED.

ENTERED BY ORDER OF THE COURT

LEONARAD GREEN

Clerk

App. 3

No. 96-1586

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN FRANCIS WRIGHT,
Petitioner-Appellant

vs. ORDER

UNITED STATES OF AMERICA,
Respondent-Appellee

Before: JONES, SILER, and DAUGHTREY, Circuit Judges.

John Wright appeals pro se from a district court judgment that denied a motion to vacate his sentence under 28 U.S.C. § 2255. He now moves for reconsideration of this court's order which denied his application for a certificate of appealability.

Wright was sentenced to 188 months of imprisonment and four years of supervised release, after being convicted of various drug distribution and money laundering charges. In 1995, counsel filed a motion to vacate Wright's sentence, alleging that it violated the Double Jeopardy Clause. The district court denied this motion on January 16, 1996. Wright filed a pro se motion for reconsideration, seeking to amend the § 22S5 motion to add issues that his attorney had not raised This motion was denied on April 17, 1999 and Wright filed timely appeal.

Wright's application for a certificate of appealability was denied because he did not make a substantial showing of the denial of a federal right, as required by 28 U.S.C.A. § 2253(c)(2) (West 1996). In denying the application, this court held that the double jeopardy claim was unavailing in light of the Supreme Court's decision in United States v. Ursery, 116 S. Ct. 2135, 2149 (1996). The court also found that the district court had acted within its discretion by refusing to allow amendment of the motion.

Wright now argues that the district court committed error of constitutional dimensions by refusing to allow amendment of his § 2255 motion. The district court did not abuse its discretion in this respect because Wright did not move for amendment until after the § 2255 motion had been denied. Moreover, the claims that Wright proposed to raise by amendment had already been substantially rejected on direct appeal. United States v. Wright, No. 92-1029, 1993 WL 465164, *7-8 (6th Cir. Nov. 10, 1993) (per curiam).

Accordingly, the motion for reconsideration is denied.

ENTERED BY ORDER OF THE COURT

LEONARAD GREEN

Clerk

App. 5

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN FRANCIS WRIGHT,
Petitioner-Appellant

vs. Case No.: 96-1586

UNITED STATES OF AMERICA,
Respondent-Appellee

APPELLANT WRIGHT'S PETITION FOR REHEARING
ON DENIAL OF CERTIFICATE OF APPEALABILITY

On 1 October 1996, this Court denied Petitioner's Certificate of Appealability. Petitioner Wright asserts that this Court has has either overlooked or misapprehended the fact that issues presented do rise to the level of a constitutional violation.

While not specifically couched in terms of a constitutional violation, arguments pertaining to the District Court's refusal to allow leave to amend do in fact rise to the level of a constitutional violation. The District Court's refusal to allow leave to amend prevented Mr. Wright from addressing one issue with the potential of overturning the convictions, and prevented Mr. Wright from addressing sentencing issues. Denial of leave to amend with the conviction issue resulted in a due process violation in that inadmissable evidence was used to convict Mr. Wright. Denial of leave to amend with the sentencing issues resulted in a due process violation in that Mr. Wright was sentenced based upon inaccurate information. Both of these issues rely upon changes that have occurred in the law subsequent to Mr. Wright's conviction.

Introduction of Inadmissable Evidence

During the criminal trial, Appellant Wright's compelled testimony from an earlier forfeiture trial was read into the record. (R 324, pages 700-747, and Appellant's Brief, pages 20 and 21).

A defendant's claim of ownership at a pretrial suppression hearing of property that he contends was unlawfully seized may not be used to prove the defendant's guilt. Simmons v. United States, 390 U.S. 377, 394, 88 S.Ct. 967, 19 L.ED.2d 1247 (1968). For the same reason, a defendant's claim of ownership of property that was subject to forfeiture may not be used for that purpose. As the Supreme Court has explained, it is "intolerable that one constitutional right should have to be surrendered in order to assert another." Id. (holding that a defendant's assertion of ownership in seized property at a pre-trial suppression motion could not later be used against him to prove guilt).

United States v. Cretacci, 62 F.3d 307, 311 (9th Cir. 1995).

The Simmons court found that use of testimony, under these circumstances, is reversible error. Cretacci was decided on 4 August 1995, only four days prior to submission of the § 2255 motion in this case. Cretacci was the first case to recognize the Simmons argument in the forfeiture trial/ criminal trial context. The Eastern District of Michigan did not recognize the application of Simmons in this context until 17 November 1995, when United States v. Barber, 906 F.Supp. 424, 427 (E.D.Mich. 1995) was decided. Therefore, this issue was not available when the § 2255 motion was submitted and the district court should have allowed amendment to address this issue. Refusal to allow said amendment resulted in a due process violation. A certificate of appealability should be issued to resolve this constitutional issue.

Intervening Change in Circuit Law

At the time of sentencing in the instant case, 14 November 1991, it was common practice for the district court to use the entire amount of drugs attributable to a given conspiracy when sentencing each defendant. Subsequent to sentencing, on 1 November 1992, the sentencing guidelines were amended with Amendment # 439. Amendment # 439 clarifies the extent to which activities of

codefendants may be attributed to an individual. The effect of this amendment is that an individual may not be sentenced to specific activities unless that individual jointly agreed to undertake said activities. The implementation of this amendment, including the fact that it applies retroactively, is fully explained in United States v. Okayfor, 996 F.2d 120-23 (6th Cir.1993), and United States v. Jenkins, 4 F.3d 1338, 1345-47 (6th Cir.1993). This Court has recently ruled that decisions concerning the reach of guideline clarifications do apply retroactively on collateral review. Oliver v. United States, 90 F.3d 177, 179 (6th Cir.1996).

Okayfor and Jenkins redefined the application of U..S.S.G. § 1B1.3. Guideline § 1B1.3 applies to "references in Chapter Two," in this case marijuana amounts, and "adjustments in Chapter Three," Role in the Offense. Therefore, Okayfor and Jenkins clarify the application of jointly undertaken activity as applied to U.S.S.G. Chapters Two and Three.

Appellant Wright attempted to amend the § 2255 motion with arguments pertaining to relevant conduct - specifically the amount of marijuana being attributed to him for sentencing purposes and his role in the offense. The District Court's refusal to allow said amendment resulted in a due process violation in that Mr. Wright was not allowed to apply Okayfor and Jenkins to his case. Therefore, a certificate of appealability should be issued so that Mr. Wright will have the opportunity to address these constitutional violations.

WHEREFORE, Appellant Wright prays that this Court will reconsider its decision to deny a certificate of appealability so that his constitutional issues may be reviewed.

Respectfully submitted,

OCT. 11, 1996
Date

JOHN F. WRIGHT
DELORES L. DONAHUE POA.

John Wright
21269 Woodhill Dr.
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48167

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing was served upon Joseph J. Allen, United States Attorney's Office, 211 W. Fort St., Suite 2300, Detroit, MI 48226-3211, by first class mail.

OCT. 11, 1996
Date

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN FRANCIS WRIGHT,
Petitioner-Appellant

vs. Case No.: 96-1586

UNITED STATES OF AMERICA,
Respondent-Appellee

PETITIONER WRIGHT'S AMENDMENT TO PETITION FOR REHEARING ON DENIAL OF CERTIFICATE OF APPEALABILITY

On October 1, 1996 this Court denied issuance of a certificate of appealability in the instant case. Appellant Wright recently filed a Petition for Rehearing on that issue. In the petition, Mr. Wright asserted that this Court had overlooked or misapprehended the fact that he was addressing constitutional issues in his appeal from the § 2255.

In addition to assertions submitted in the original Petition for Rehearing, Mr. Wright requests that this Court consider the following question:

GIVEN THE FACT THAT HABEAS COUNSEL SUBMITTED THE § 2255 CONTRARY TO PETITIONER'S INSTRUCTIONS, THAT PETITIONER NEITHER SIGNED NOR ADOPTED THE § 2255, AND THE DISTRICT COURT REFUSED PETITIONER LEAVE TO AMEND WITH HIS OWN ARGUMENTS; IS THIS SITUATION FUNDAMENTALLY UNFAIR AND DOES IT RISE TO THE LEVEL OF A DUE PROCESS VIOLATION REQUIRING THE ISSUANCE OF A CERTIFICATE OF APPEALABILITY?

The underlying facts pertaining to this situation were fully addressed in the Brief of Appellant John Wright submitted heretofore. Mr. Wright hired attorney James C. Howarth to file a collateral attack in Mr. Wright's criminal case. Mr. Wright instructed attorney Howarth to submit the petition to Mr. Wright for review prior to filing. Contrary to Mr. Wright's instructions, attorney Howarth submitted the § 2255 under his own signature. Mr. Wright neither signed nor adopted the § 2255. Mr. Wright was not aware that the § 2255 had been filed until after the government had responded in the case. Mr. Wright instructed attorney Howarth to amend the § 2255 with additional arguments. Attorney Howarth refused to amend the § 2255. Mr. Wright attempted to amend the § 2255 but prior to his submitting the amendment the § 2255 was denied. Mr. Wright filed a pro se motion to alter the judgment to allow amendment or to disregard the § 2255 filed by attorney Howarth. This too was denied.

Mr. Wright should not be forced to be prejudiced by the filings of an attorney that refused to follow his instructions or proper procedure. For relief, Mr. Wright is requesting that the case be remanded to allow amendment or to disregard the filing of attorney Howarth in its entirety. Should this Court not grant relief at this stage, it is very likely that Mr. Wright will never have the opportunity to address the meritorious claims that he has identified. Due to recent changes in § 2255 procedure, situations under which a successive § 2255 may be filed are extremely limited.

Mr. Wright acknowledges that the client is often responsible for the actions of his attorney. In this case the attorney totally disregarded the client's wishes, initiating the case without the client's permission. Mr. Wright never signed or adopted the § 2255 and then, once he became aware that the action had been filed, he instructed the attorney to amend. Attorney Howarth became a "runaway attorney," acting contrary to and in total disregard to the wishes of his client. Due process demands that Mr. Wright be given an opportunity to address his meritorious issues.

WHEREFORE, Petitioner Wright prays that this Court will issue a certificate of appealability.

Respectfully submitted,

OCT. 11, 1996
Date

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CERTIFICATE OF SERVICE

A true and correct copy of the foregoing was provided to Joseph J. Allen, United States Attorney's Office, 211 W. Fort St., Suite 2300, Detroit, MI 48226-3211 by first-class mail.

OCT. 11, 1996
Date

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a consciousness that his case is weak and from that the defendant's guilty may be inferred. United States v. Mendez-Ortiz, 810 F.2d 76-79 (6th Cir. 1986), cert. denied, 480 U.S. 922 (1987). Such evidence is relevant regardless of whether the defendant testifies.

VII. THE DISTRICT COURT PROPERLY RESOLVED ALL SENTENCING ISSUES.

A. Enhancina D'Annunzio's sentence by two levels does not unconstitutionally interfere with the defendant's right to testify.

D'Annunzio argues that the assessment of two points for testifying untruthfully at trial chills his right to testify. Defendant does not argue that the district court's factual finding on this element was clearly erroneous. This circuit has repeatedly held that false testimony at trial requires a two point enhancement for obstruction under U.S.S.G. §3Cl.l. While a defendant has a constitutional right to testify, he has no constitutional right to commit perjury. United States v. Alverez, 927 F.2d 300 (6th Cir. 1991); United States v. Head, 927 F.2d 1361 (6th Cir. 1991). Cf., United States v. Grayson, 438 U.S. 41 (1978) (judge may enhance preguidelines sentence upon finding that defendant committed perjury. Punishing willfully false testimony does not chill the defendant's right to testify).

B. The district court's assessment of Larry Reid's and John Wright's offense levels are not clearly erroneous.

Both Larry Reid and John Wright argue that the district court's factual finding regarding the application of the Drug Quantity Table contained in U.S.S.G. §2Dl.l was clearly erroneous.

In each instance, the district court correctly made factual findings regarding the drug quantities involved for each defendant. "Relevant conduct" for sentencing guidelines purposes is defined as:

All acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable, that occurred during the commission of the offense of conviction, in preparation for that offense or in the course of attempting to avoid detection or responsibility for that offense, or that otherwise were in furtherance of that offense;

U.S.S.G. §1B1.3 (a) (l).

The commentary explains that for joint or conspiratorial conduct, such as that in this case, relevant conduct includes "conduct of others in furtherance of the execution of the jointly undertaken criminal activity that was reasonably foreseeable by the defendant." Application Note l, U.S.S.G. §1Bl.3. This circuit has interpreted this rule to mean that a defendant can be sentenced to the conduct of his codefendant where the defendant knew or should have known the amount of drugs involved. United States v. Blankenship, 954 F.2d 1224 (6th Cir. 1992). Responsibility for others' conduct is required under the guidelines even where the defendant was not specifically aware of the total amount of drugs involved. United States v. Sailes, 872 F.2d 735 (6th Cir. 1989) (defendant properly held accountable for entire drug quantity found at her property where she pled guilty to participating in her son's drug trafficking activity, even though the defendant was not specifically aware of a second packet of cocaine seized by authorities). The factual findings concerning drug amounts is a finding of fact which this court reviews only where clearly erroneous. United States v. Hughes, 898 F.2d 63 (6th Cir. 1990).

JOHN WRIGHT

Wright was sentenced based upon a district court determination that he should be held responsible for between 3,000 and 10,000 kilograms of marijuana. Wright argues that this assessment was clearly erroneous. In essence, he argues that Michael Shandilis' testimony concerning the amount of money that Shandilis owed

Wright, the reason he owed the money, and Shandilis' ledgers which corroborate his testimony are "totally implausible." (Wright appeal brief at 26).

Wright's entire argument is based upon the faulty premise that Wright can only be held accountable only for the marijuana that was stored in his house or that he drove from California or New York. Rather, Wright can be held responsible for the entire amount of the marijuana about which he knew or should have known. Blankenship. As the district court noted in the sentencing hearing in this matter:

But the truth of the matter is, it's entirely possible every coconspirator in this conspiracy could be charged, frankly, with helping facilitate and possess and distribute far in excess of the mere 7,000 pounds of marijuana, because far more than that was involved over the period and term of the conspiracy.

(Wright Sentencing, 11/14/91 at 24).

The conspiracy was massive in scope. Michael Shandilis testified that the conspiracy was responsible for approximately 37 20,000 pounds of marijuana. Shandilis' own ledgers indicated that his dealers owed him in March of 1989 approximately $3,300,000 for marijuana already distributed, which, at $1,000 per pound, translated into 3,300 pounds of marijuana. In addition, there were approximately 3,000 pounds of unsold marijuana kept in the three Shandilis warehouses at the time of the search warrants. The warehouse at 1945 County Farm had between 2,000 and 3,000 pounds of marijuana stored in it at one time. (Shandilis, 7/9/91 at 229). Shandilis' ledgers indicate regular deliveries of massive amounts of money to his supplier- in California, Brian Zeiner. (Id. at 229). In addition, Shandilis' own lifestyle indicates that this was a massive venture. He was able to give Wright $60,000 for the down payment of on 1945 County Farm, pay the mortgage and utilities on the house, live in yet another house, and still be able to pay Wright $135,000 as down payment for $475,000 worth of property in California.

Wright was in a perfect position to know the scope of the conspiracy. He was familiar with every aspect of the conspiracy, from picking up five hundred pound loads in California (Karnuth, 7/11/91 at 196-97) and New York (Shandilis, 7/9/91 at 190), to the warehouse operations (Shandilis, 7/9/91 at 224-28), to introducing Michael Shandilis to potential marijuana sellers (Heinlen, 7/11/91 at 11; Debono, 7/12/91 at 444-48), to arranging for babysitters at the house (Hampton, 7/11/91 at 62), to unloading marijuana from trucks (Id. at 66, 71)[2], to distributing the marijuana to the sellers (Debono, 7/12/ 91 at 451), to laundering the proceeds of the illegal drug sales (Shandilis, 7/9/91 at 266-73; Lavigne, 7/15/91 at 639-42), and finally, to assisting Michael Shandilis in covering up the conspiracy after Shandilis had fled the state, including perjuring himself at the civil forfeiture trial by denying ever having known Shandilis. (Shandilis, 7/9/91 at 288-91). The entire conspiracy distributed between 18,000 and 20,000 pounds. (Shandilis, 7/10/91 at 143). Wright was well positioned to observe and participate in the entire range of conspiratorial activities. The district court's rationale that Wright knew or should have known that the conspiracy distributed 7,000 pounds is not clearly erroneous.

Wright makes much of the district court's assessment that Kim Bennet should have received a similar sentence to John Wright. This is probably true. The sentence guidelines state that, even in jointly undertaken activity as here, "relevant conduct" will be different for different defendants, because each participant's foreseeable knowledge will differ. Application Note 1, U.S.S.G. §1B1.3. In the government's view, Kim Bennet received comparatively light sentence for his relative criminal culpability. This was based on a factual finding by the district court which we

[2] Despite Wright's claim on appeal to the contrary, testimony at trial showed that Wright assisted in the drying and rebagging of approximately 2,000 pounds of mouldy marijuana at 1945 County Farm. (Hampton, 7/11/91 at 78-79; Kondrath, 7/11/91 at 235). Michael Shandilis testified that he was unsure of whether Wright helped on that particular episode. (Shandilis, 7/9/91 at 231).

believe was in error. However, simply because Kim Bennet's sentence was less than John Wright's does not make the district court's determination, made after hearing all of the evidence in an extensive trial, clearly erroneous.

Wright also argues that some conspirators who pleaded guilty received sentenced based on a smaller quantity of drugs. It is no defense to compare John Wright's relevant conduct with those conspirators who pleaded guilty. The government's knowledge about that which was readily provable changed as more evidence was gathered. For example, Michael Shandilis decided to plead guilty and cooperate relatively late in the process. Those who were convicted earlier were able to take advantage of the government's lack of knowledge of what was foreseeable by each defendant.

LARRY REID

Larry Reid was sentenced on the basis that he knew or should have known about 1,080 to 1,560 pounds of marijuana. Reid objects on appeal to that assessment, and makes no suggestion as to why the finding of the district court is clearly erroneous, other than to invite this court to read the sentencing transcript. (Reid brief on appeal at 42). The sentencing was based on the district court's assessment of the testimony given at trial, including the ledgers which indicated that Reid owed Shandilis $177,000 for marijuana, that Reid was one of Shandilis' larger dealers, in the end taking one hundred pounds of marijuana at a time (Shandilis, 7/9/91 at 215), and that Reid was aware that Shandilis had other dealers working for him. (Arvin, 7/12/91 at 510-517).

§ 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal. (As amended Oct. 31, 1951, c. 655, § 17b, 65 Stat. 717.)

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

§ 1956. Laundering of monetary instruments

(a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity—

(A) with the intent to promote the carrying on of specified unlawful activity; or

(B) knowing that the transaction is designed in whole or in part—

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal law, shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.

(2) Whoever transports or attempts to transport a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States—

(A) with the intent to promote the carrying on of specified unlawful activity; or

(B) knowing that the monetary instrument or funds involved in the transportation represent the proceeds of some form of unlawful activity and knowing that such transportation is designed in whole or in part—

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal law, shall be sentenced to a fine of $500,000 or twice the value of the monetary instrument or funds involved in the transportation, whichever is greater, or imprisonment for not more than twenty years, or both.

(b) Whoever conducts or attempts to conduct a transaction described in subsection (a)(1), or a transportation described in subsection (a)(2), is liable to the United States for a civil penalty of not more than the greater of—

(1) the value of the property, funds, or monetary instruments involved in the transaction; or

(2) $10,000.

(c) As used in this section—

(1) the term "knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity" means that the person knew the property involved in the transaction represented proceeds from some form, though not necessarily which form, of activity that constitutes a felony under State or Federal law, regardless of whether or not such activity is specified in paragraph (7);

(2) the term "conducts" includes initiating, concluding, or participating in initiating, or concluding a transaction;

(3) the term "transaction" includes a purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition, and with respect to a financial institution includes a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument, or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected;

(4) the term "financial transaction" means a transaction involving the movement of funds by wire or other means or involving one or more monetary instruments, which in any way or degree affects interstate or foreign commerce, or a transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree;

(5) the term "monetary instruments" means coin or currency of the United States or of any other country, travelers' checks, personal checks, bank checks, money orders, investment securities in bearer form or otherwise in such form that title thereto passes upon delivery, and negotiable instruments in bearer form or otherwise in such form that title thereto passes upon delivery;

(6) the term "financial institution" has the definition given that term in section 5312(a)(2) of title 31, United States Code, and the regulations promulgated thereunder;

(7) the term "specified unlawful activity" means—

(A) any act or activity constituting an offense listed in section 1961(1) of this title except an act which is indictable under the Currency and Foreign Transactions Reporting Act;

(B) with respect to a financial transaction occurring in whole or in part in the United States, an offense against a foreign nation involving the manufacture, importation, sale, or distribution of a controlled substance (as such term is defined for the purposes of the Controlled Substances Act);

(C) any act or acts constituting a continuing criminal enterprise, as that term is defined in section 408 of the Controlled Substances Act (21 U.S.C. 848); or

(D) an offense under section 152 (relating to concealment of assets; false oaths and claims; bribery), section 215 (relating to commissions or gifts for procuring loans), any of sections 500 through 503 (relating to certain counterfeiting offenses), section 511 (relating to securities of States and private entities), section 543 (relating to smuggling goods into the United States), section 641 (relating to public money, property, or records), section 6~6 (relating to theft, embezzlement, or misapplication by bank officer or employee), section 666 (relating to theft or bribery concerning programs receiving Federal funds), section 793, 794, or 798 (relating to espionage), section 875 (relating to interstate communications), section 1201 (relating to kidnaping), section 1203 (relating to hostage taking), section 1344 (relating to bank fraud), or section 2113 or 2114 (relating to bank and postal robbery and theft) of this title, section 38 of the Arms Export Control Act (22 U.S.C. 2778), section 2 (relating to criminal penalties) of the Export Administration Act of 1979 (50 U.S.C.App. 2401), section 203 (relating to criminal sanctions) of the International Emergency Economic Powers Act (50 U.S.C. 1702), or section 3 (relating to criminal violations) of the Trading with the Enemy Act (50 U.S.C.App. 3).

(d) Nothing in this section shall supersede any provision of Federal, State, or other law imposing criminal penalties or affording civil remedies in addition to those provided for in this section.

(e) Violations of this section may be investigated by such components of the Department of Justice as the Attorney General may direct, and by such components of the Department of the Treasury as the Secretary of the Treasury may direct, as appropriate. Such authority of the Secretary of the Treasury shall be exercised in accordance with an agreement which shall be entered into by the Secretary of the Treasury and the Attorney General.

(f) There is extraterritorial jurisdiction over the conduct prohibited by this section if—

(1) the conduct is by a United States citizen or, in the case of a non-United States citizen, the conduct occurs in part in the United States; and

(2) the transaction or series of related transactions involves funds or monetary instruments of a value exceeding $10,000.

(Added Pub.L. 99-570, Title XIII, § 1352(a), Oct. 27, 1986, 100 Stat. 3207-18.)

§ 1957. Engaging in monetary transactions in property derived from specified unlawful activity

(a) Whoever, in any of the circumstances set forth in subsection (d), knowingly engages or attempts to engage in a monetary transaction in criminally derived property that is of a value greater than $10,000 and is derived from specified unlawful activity, shall be punished as provided in subsection (b).

(b)(1) Except as provided in paragraph (2), the punishment for an offense under this section is a fine under title 18, United States Code, or imprisonment for not more than ten years or both.

(2) The court may impose an alternate fine to that imposable under paragraph (1) of not more than twice the amount of the criminally derived property involved in the transaction.

(c) In a prosecution for an offense under this section, the Government is not required to prove the defendant knew that the offense from which the criminally derived property was derived was specified unlawful activity.

(d) The circumstances referred to in subsection (a) arc

(1) that the offense under this section takes place in the United States or in the special maritime and territorial jurisdiction of the United States; or

(2) that the offense under this section takes place outside the United States and such special jurisdiction, but the defendant is a United States person (as defined in section 3077 of this title, but excluding the class described in paragraph (2)(D) of such section).

(e) Violations of this section may be investigated by such components of the Department of Justice as the Attorney General may direct, and by such components of the Department of the Treasury as the Secretary of the Treasury may direct, as appropriate. Such authority of the Secretary of the Treasury shall be exercised in accordance with an agreement which shall be entered into by the Secretary of the Treasury and the Attorney General.

(f) As used in this section—

(1) the term "monetary transaction" means the deposit, withdrawal, transfer, or exchange, in or affecting interstate or foreign commerce, of funds or a monetary instrument (as defined for the purposes of subchapter II of chapter 53 of title 31) by, through, or to a financial institution (as defined in section 5312 of title 31);

(2) the term "criminally derived property" means any property constituting, or derived from, proceeds obtained from a criminal offense; and

(3) the term "specified unlawful.activity" has the meaning given that term in section 1956 of this title. (Added Pub.L. 99-570, Title XIII, § 1352(a), Oct. 27, 1986 100 Stat. 3207-21.)

PART DEFENSES AND PENALTIES

§ 841. Prohibited acts A

Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Except as-otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving—

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of—

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iv) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1~2¦phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight; or

(viii) 100 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 1 kilogram or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers; such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of

that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death o" serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 84a. 845a, or 845b of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. For purposes of this subparagraph, the term "felony drug offense" means an offense that is a felony under any provision of this subchapter or any other Federal law that
prohibits or restricts conduct relating to narcotic drugs, marihuana, or depressant or stimulant substances or a felony under any law of a State or a foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, or depressant or stimulant substances. Any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving—

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of—

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 100 or more marihuana plants regardless of weight; or

(viii) 10 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 100 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence

imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II except as provided in Subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment

and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil or in the case of any controlled substance in schedule III, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 6 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $100,000 if the defendant is an individual or $250,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more convictions of him for an offense punishable under this paragraph, or for a crime under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of

not more than 2 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $200,000 if the defendant is an individual or $500,000 if the defendant is other than an individual, or both.

4) Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in section 844 of this title and section 3607 of Title 18.

(5) Any person who violates subsection (a) of this section by cultivating a controlled substance on Federal property shall be imprisoned as provided in this subsection and shall be fined any amount not to exceed—

(A) the amount authorized in accordance with this section;

(B) the amount authorized in accordance with the provision of Title 18;

(C) $500,000 if the defendant is an individual;

(D) $1,000,000 if the defendant is other than an individual; or both.

(6) Any person who violates subsection (a) of this section, or attempts to do so, and knowingly or intentionally uses a poison, chemical, or other hazardous substance on Federal land, and, by such use—

(A) creates a serious hazard to humans, wildlife, or domestic animals,

(B) degrades or harms the environment or natural resources, or

(C) pollutes an aquifer, spring, stream, river, or body of water, shall be fined in accordance with Title 18, or imprisoned not more than five years, or both.

(c) Repealed. Pub.L. 98-473, Title II, § 224(a)(2), Oct. 12, 1984, 98 Stat. 2030.

Offenses involving listed chemicals

(d) Any person who knowingly or intentionally—

(1) possesses a listed chemical with intent to manufacture a controlled substance except as authorized by this subchapter;

(2) possesses or distributes a listed chemical knowing, or having reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance except as authorized by this title; or

(3) with the intent of causing the evasion of the record-keeping or reporting requirements of section 830 of th}s title, or the regulations issued under that section, receives or distributes a reportable amount of any listed chemical in units small enough so that the making of records or filing of reports under that section is not required;

shall be fined in accordance with Title 18, or imprisoned not more than 10 years, or both.

Boobytraps on Federal property;
penalties; definitions

(e)(1) Any person who assembles, maintains, places, or causes to be placed a boobytrap on Federal property where a controlled substance is being manufactured, distributed, or dispensed shall be sentenced to a term of imprisonment for not more than 10 years and shall be fined not more than $10,000.

(2) If any person commits such a violation after 1 or more prior convictions for an offense punishable under this subsection, such person shall be sentenced to a term of imprisonment of not more than 20 years and shall be fined not more than $20,000.

(3) For the purposes of this subsection, the term "boobytrap" means any concealed or camouflaged device designed to cause bodily injury when triggered by any action of any unsuspecting person making contact with the device. Such term includes guns, ammunition, or explosive devices attached to trip wires or other triggering mechanisms, sharpened stakes, and lines or wires with hooks attached.

Ten-year injunction as additional penalty

(f) In addition to any other applicable penalty, any person convicted of a felony violation of this section relating to the receipt, distribution, or importation of a listed chemical may be enjoined from engaging in any regulated transaction involving a listed chemical for not more than ten years.

Wrongful distribution or possession of listed chemicals

(g)(1) Whoever knowingly distributes a listed chemical in violation of this subchapter (other than in violation of a recordkeeping or reporting requirement of section 830 of this title) shall be fined under Title 18, or imprisoned not more than 5 years, or both.

(2) Whoever possesses any listed chemical, with knowledge that the recordkeeping or reporting requirements of section 830 of this title have not been adhered to, if, after such knowledge is acquired, such person does not take immediate steps to remedy the violation shall be fined under Title 18, or imprisoned not more than one year, or both.

(Pub.L. 91-513, Title II, § 401, Oct. 27, 1970, 84 Stat. 1260; Pub.L. 95-633, Title II, § 201, Nov. 10, 1978, 92 Stat. 3774; Pub.L. 96-359, § 8(c), Sept. 26, 1980, 94 Stat. 1194; Pub.L. 98-473, Title II, §§ 224(a), 502, 503(b)(1), (2), Oct. 12, 1984, 98 Stat. 2030, 2068, 2070; Pub.L. 98-473, § 224(a), as amended Pub.L. 99-570, Title I, § 1005(a), Oct. 27, 1986, 100 Stat. 3207-6; Pub.L. 99-570, Title I, §§ 1002, 1003(a), 1004(a), 1103, Title XV, § 15005, Oct. 27, 1986, 100 Stat. 3207-2, 3207-5, 32074, 3207-11, 3207-192; Pub.L. 100-690, Title VI, §§ 6055, 6254(h), 6452(a), 6470(g), (h), 6479, Nov. 18, 1988, 102 Stat. 4318, 4367, 4371, 4378, 4382; Pub.L. 101-647, Title X, § 1002(e), Title XII, § 1202, Title XXXV, § 3599K, Nov. 29, 1990, 104 Stat. 4828, 4830, 4932.)

Subsecs. (b)(4) and (c) of this Section Applicable to Offenses Committed Prior to Nov. 1, 1987

Subsecs. (b)(4) and (c) of this section as in effect prior to amendment by Pub.L. 98-473, § 224(a), read as follows:

(b) Penalties

Except as otherwise provided in section 845, 845a, or 845b of this title [now section 859, 860, or 861 of this title], any person who violates subsection (a) of this section shall be sentenced as follows:

(4) Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in subsections (a) and (b) of section 844 of this title.

(c) Special parole term

A special parole term imposed under this section or section 845, 845a or 845b of this title [now section 859, 860, or 861 of this title] may be revoked if its terms and conditions are violated. In such circumstances the original term of imprisonment shall be increased by the period of the special parole term and the resulting new term of imprisonment shall not be diminished by the time which was spent on special parole. A person whose special parole term has been revoked may be required to serve all or part of the remainder of the new term of imprisonment. A special parole term provided for in this section or section 845, 845a or 845b of this title [now section 859 860, or 861 of this title] shall be in addition to, and not in lieu of, any other parole provided for by law.

[See Codification notes below.]

For applicability of sentencing provisions to offenses, see Effective Date and Savings Provisions, etc., note,

§ 846. Attempt and conspiracy

Any person who attempts o~ conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

(Pub.L. 91-513, Title II, § 406, Oct. 27, 1970, 84 Stat. -1265, amended Pub.L. 100-690, Title VI, § 6470(a), Nov. 18, 1988, 102 Stat. 4377.)

§ 1746. Unsworn declarations under penalty of perjury

Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form:

(1) If executed without the United States: "I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date).

(Signature)".

(2) If executed within the United States, its territories, possessions, or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date).

(Signature)".

(Added Pub.L. 94-550, § 1(a), Oct. 18, 1976, 90 Stat. 2534.)

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)(l) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from

(A) the final order in a habeas corpus proceeding in which. the detention complained of arises out of process issued by a State court; or

(B) the final order m a proceeding under section 225.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (l) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

(As amended Apr. 24, 1996, Pub.L. 104-132,Title I, § 102, 110 Stat. 1217.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1996 Acts. Senate Report. No. I04 li9 and House Conference Report No. 104 518, see 1996 U.S. Code Cong. and Adm. News, p. 924.

§ 2255. Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

(As amended May 24, 1949, c. 139, § 114, 63 Stat. 105.)

REVISION NOTES
1948 ACT

This section restates, clarifies and simplifies the procedure in the nature of the ancient writ of error coram support such determination. If the applicant, because of indigence or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or- becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.
(As amended Apr. 24, 1996, Pub.L. 104-132, Title I, § 104, 110 Stat. 1218.

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1996 Acts. Senate Report No. 104-179 and House Conference Report No. 104-518, see 1996 U.S. Code Cong. and Adm. News, p. 924.

References in Text

Section 408 of the Controlled Substances Act, referred to in subsec. (h), is classified to section 848 of Title 21, Food and Drugs.

§ 2255. Federal custody; remedies on motion attacking sentence

[See main volume for text of undesignated pars.]

A l-year period of limitation shall ap~ly to a m()tion under this section. The limitation period shall run fiom tthe latest of—

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as pronded by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

A second or successive motion must be cer1;ified as pronded in section 2244 by ā panel of the appropriate court of appeals to contain—

(1) newly discovered endence that, if proven and newed in light of the endence as a whole, would be sufficient to establish by clear and connncing endence that no reasonable factfind~r would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.
(As amended Apr. 24, 1996, Pub.L. 104-132, Title I, § 105, 110 Stat. 1220.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1996 Acts. Senate Report No. 104-179 and House Conference Report No. 104-518, see 1996 U.S. Code Cong. and Adm. News, p. 924.

Refercnces in Text

Section 408 of the Controlled Substances Act referred to in text, is classified to section 848 of Title 21, Food and Drugs.

Rule 2.

a) Nature of application for relief. If the person is presently in custody pursuant to the federal judgment in question, or if not presently in custody may be subject to such custody in the nuture pursuant to such judgment, he application for relief shall be in the form of a motion to vacate, set aside, or correct the sentence.

(b) Form of motion. The motion shall be in substantially the form annexed to these rules, except that any district court may by local rule require that motions filed with it shall be in a form prescribed by the local rule. Blank motions in the prescribed form shall be made available without charge by the clerk of the district court to applicants upon their request. It shall specify all the grounds for relief which are available to the movant and of which he has or, by the exercise of reasonable diligence, should have

knowledge and shall set forth in summary form the facts supporting each of the grounds thus specified. It shall also state the relief requested. The motion shall be typewritten or legibly handwritten and shall be signed under penalty of perjury by the petitioner.

(c) Motion to be directed to one judgment only. A motion shall be limited to the assertion of a claim for relief against one judgment only of the district court. If a movant desires to attack the validity of other judgments of that or any other district court under which he is in custody or may be subject to future custody, as the case may be, he shall do so by separate motions.

(d) Return of insufficient motion. If a motion received by the clerk of a district court does not substantially comply with the requirements of rule 2 or 3, it may be returned to the movant, if a judge of the court so directs, together with a statement of the reason for its return. The clerk shall retain a copy of the motion.

(As amended Pub.L. 94-426, § 2(3), (4), Sept. 28, 1976, 90 Stat. 1334; Apr. 28, 1982, eff. Aug. 1, 1982.)

Rule11. Signing of Pleadings, Motions, and Other Papers; Representations to Court; Sanctions

(a) Signature. Every pleading, written motion, and other paper shall he signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

(b) Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances.—

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentialy support or, if specifically so identified, are likely to have evidentialy .support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or. if specifically so identified, are reasonably based on a lack of information or belief.

(c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(A) By Motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5. but shall not be filed with or

presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) On Court's Initiative. On it's own initiative the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law film, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) Nature of Sanction; Limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court. or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(d) Inapplicability to Discovery. Subdivision.c (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37.

Rule 15. Amended and Supplemental Pleadings (a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the

court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(c) Relation Back of Amendments. An amendment of a pleading relates back to the date of the original pleading when

(1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or

(2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or

(3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

The delivery or mailing of process to the United States Attorney, or United States Attorney's designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of subparagraphs (A) and (B) of this paragraph (3) with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

(d) Supplemental Pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

(As amended Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 1991, eff Dec. 1, 1991; Dec. 9, 1991, Pub.L. 102-198, § 11(a), 106 Stat. 1626; Apr. 22, 1993, eff. Dec. 1, 1993.)

ADVISORY COMMITTEE NOTES
1937 Adoption

See generally for the present federal practice, [former] Equity Rules 19 (Amendments Generally), 28 (Amendment of Bill as of Course), 32 (Answer to Amended Bill), 34 (Supplemental Pleading), and 35 (Bills of Revivor and Supplemental Bills—Form); U.S.C. Title 28, § 399 [now 1653] (Amendments to show diverse citizenship) and [former] 777 (Defects of form; amendments). See English Rules Under the Judicature Act (The Annual Practice, 1937) O. 28, r. r. 1-13; O. 20,r.4; 0.24,r.r. 1-3.

Note to Subdivision (a). The right to serve an amended pleading once as of course is common. 4 Mont.Rev.Codes Ann. (1935) § 9186; 1 Ore.Code Ann. (1930) § 1-904; 1 S.C.Code (Michie, 1932) § 49:3; English Rules Under the Judicature Act (The Annual Practice, 1937) O. 28, r. 2. Provision for amendment of pleading before trial, by leave of court, is in almost every code. If there is no statute the power of the court to grant leave is said to be inherent. Clark, Code Pleading (1928), pp. 498, 509.

Note to Subdivision (b). Compare [former] Equity Rule 19 (Amendments Generally) and code provisions which allow an amendment "at any time in furtherance of justice," (e.g., Ark.Civ.Code (Crawford, 1934) § 155) and which allow an amendment of pleadings to conform to the evidence, where the adverse party has not been misled and prejudiced (e.g., N.M.Stat.Ann. (Courtright, 1929) §§ 105-601, 105-602).

Rule 22. Habeas corpus and section 2255 proceedings

(a) Application for the original writ.— An application for a writ of habeas corpus shall be made to the appropriate district court. If application is made to a circuit judge, the application shall be transferred to the appropriate district court. If an application is made to or transferred to the district court and denied, renewal of the application before a circuit judge shall not be permitted. The applicant may, pursuant to section 2253 of title 28, United State Code, appeal to the appropriate court of appeals from the order of the district court denying the writ.

(b) Certificate of appealability.—In a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court, an appeal by the applicant for the writ may not proceed unless a district or a circuit judge issues a certificate of appealability pursuant to section 2253(c) of title 28, United States Code. If an appeal is taken by the applicant, the district judge who rendered the judgment shall either issue a certificate of appealability or state the reasons why such a certificate should not issue. The certificate or the statement shall be forwarded to the court of appeals with the notice of appeal and the file of the proceedings in the district court. If the district judge has denied the certificate, the applicant for the writ may then request issuance of the certificate by a circuit judge. If such a request is addressed to

the court of appeals, it shall be deemed addressed to the judges thereof and shall be considered by a circuit judge or judges as the court deems appropriate. If no express request for a certificate is filed, the notice of appeal shall be deemed to constitute a request addressed to the judges of the court of appeals. If an appeal is taken by a State or it's representative, a certificate of appealability is not required.

(As amended Pub.L. 104-132, Title I, § 103, Apr. 24, 1996, 110 Stat. 1218.)

1982 AMENDMENT

Note to subdivision (b). The amendment takes into account 28 U.S.C. § 1746, enacted after adoption of the § 2255 rules. Section 1746 provides that in lieu of an affidavit an unsworn statement may be given under penalty of perjury in substantially the following form if executed within the United states, itS territories, possessions or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (signature)." The statute is "intended to encompass prisoner litigation," and the statutory alternative iS especially appropriate in such cases because a notary might not be readily available. Carter v. Clark, 616 F.2d 228 (5th cir. 1980). The § 2255 forms have been revised accordingly.

sub•scribe \səbz´krib, -b´sk-\ vb [ME subscriben, fr. L subscribere, fr. sub- + scribere to write — more at SCRIBE] vt 1: to write (as one's name) underneath : sign (one's name) to a document 2 a : to sign with one's own hand : give consent to or bind oneself to the terms of (something written) by appending one's name b : to attest by appending one's name <officers ~ their official acts> C obs : to sign away : RESIGN, YIELD d (1) : to promise to give <each man subscribed ten dollars> (2) : CONTRIBUTE <each subscribing . . . that which it can do best—W.J.Haley> 3 chiefly Brit : to give support to or concur in : FAVOR, SANCTION <unable to . . . ~ their beliefs—T.E.Lawrence> 4 obs : to declare with or as if with signature : PUBLISH <I will ~ him a coward—Shak.> ~ vi 1 : to sign one's name to a letter or other document 2 a : to give approval to something written by signing—often used with to <found him unwilling to ~ to the agreement> b : to set one's name to a paper in token of promise to give something (as a sum of money); also : to give something in pursuance of a promise so made c (1) : to enter one's name for a publication (as a book or newspaper) or service—usu. used with for and sometimes with to (2) : to agree to take and pay for something (as stock) by signing one's name to a formal agreement; esp : to make a signed application for securities of a new offering — usu. used with for <subscribed for 1000 shares> 3 obs : to become surety 4 obs : YIELD, SUBMIT 5 a : to be in accord : ACQUIESCE, AGREE — usu. used with to <~ to a doctrine> b : ADHERE, BELONG <~ to the masculine gender> syn see ASSENT

Subscribe. Literally to write underneath, as one's name. To sign at the end of a document. Also, to agree in writing to furnish money or its equivalent, or to agree to purchase some initial stock in a corporation. See also Attest; Subscriber; Subscription.